

Appendix A.

Performance Bond.

1. Know all men that we, MELVIN F. BURGESS, INC., as principal, and NEW AMSTERDAM CASUALTY COMPANY, a corporation of the State of New York, as Surety, are held and firmly bound unto the KNOXVILLE Electric Power and Water Board, Knoxville, Tennessee (hereinafter called the "Owner") and unto the United States of America (hereinafter called the "Government") and unto all persons, firms and corporations who or which may furnish materials for or perform labor on a Rural Electrification Administration Project known as Project REA, Tenn. 0030 A1—B1 Knoxville Public—PWA Docket Tenn. 3289 P and to their successors and assigns, in the penal sum of Two Hundred and fourteen thousand two hundred and sixteen—84/100 (\$214,216.84) Dollars, as hereinafter set forth and for the payment of which sum well and truly to be made we bind ourselves, our executors, administrators, successors and assigns jointly and severally by these presents. Said Project is described in a certain construction contract (hereinafter called the "Construction Contract") between the Owner and the Principal, dated February 20, 1940, pursuant and subject to a certain loan contract (hereinafter called the "Loan Contract") between the Owner and the Government, acting through the Administrator of the Rural Electrification Administration (hereinafter called the "Administrator"), dated January 25, 1940.

2. The condition of this obligation is such that that if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of the Construction Contract and any amendments thereto, whether such amendments are for additions, decreases, or changes in materials, their quantity, kind or price, labor costs, mileage, routing or any other purpose

whatsoever and whether such amendments are made with or without notice to the Surety, and shall fully indemnify and save harmless the Owner and the Government from all costs and damages which they, or either of them, shall suffer or incur by reason of any failure so to do, and shall fully reimburse and repay the Owner and the Government for all outlay and expense which they, or either of them, shall incur in making good any such failure of performance on the part of the principal, and shall promptly make payment to all persons supplying labor and materials for use in the construction of the Project contemplated in the Construction Contract and any amendments thereto, and shall well and truly reimburse the Owner and the Government, as their respective interests may appear, for any excess in the cost of construction of said Project over the cost of such construction as provided in the Construction Contract and any amendments thereto, occasioned by any default of the Principal under the Construction Contract and any amendments thereto, then this obligation shall be null and void, but otherwise shall remain in full force and effect.

3. It is expressly agreed that this bond shall be deemed amended automatically and immediately, without formal and separate amendment hereto, upon any amendment to the Construction Contract, so as to bind the Principal and the Surety to the full and faithful performance of the Construction Contract as so amended, provided only that the total amount of all increases in the cost of construction shall not exceed 20 per cent of the amount of the maximum price set forth in the Construction Contract. The term "amendment", wherever used in this bond, and whether referring to this bond, the Construction Contract or the Loan Contract, shall include any alteration, addition, extension, modification, amendment, rescission, waiver, release or annulment, of any character whatsoever.

4. It is expressly agreed that any amendment which may be made by agreement or otherwise between the prin-

cipal and the Owner in the terms, provisions, covenants and conditions of the Construction Contract, or in the terms, provisions, covenants and conditions of the Loan Contract (including, without limitation, the granting by the Administrator to the Owner of any extension of time for the performance of the obligations of the Owner under the Loan Contract or the granting by the Administrator or the Owner to the Principal of any extension of time for the performance of the obligations of the Principal under the Construction Contract, or the failure or refusal of the Administrator or the Owner to take any action, proceeding or step to enforce any remedy or exercise any right under either the Construction Contract or the Loan Contract, or the taking of any action, proceeding or step by the Administrator or the Owner, acting in good faith upon the belief that the same is permitted by the provisions of the Construction Contract or the Loan Contract) shall not in any way release the Principal and the Surety, or either of them, or their respective executors, administrators, successors or assigns, from liability hereunder. The Surety hereby acknowledges receipt of notice of any amendment, indulgence or forbearance, made, granted or permitted.

5. This bond is made for the benefit of all persons, firms and corporations who or which may furnish any materials or perform any labor for or on account of the construction to be performed under the Construction Contract and any amendments thereto, and they and each of them, are hereby made obligees hereunder with the same force and effect as if their names were written herein as such and they and each of them may sue hereon.

IN WITNESS WHEREOF, the undersigned have caused this instrument to be executed and their respective corporate

seals to be affixed and attested by their duly authorized representatives this 20th day of February, 1940.

MELVIN F. BURGESS, INC. (Seal)
Principal

By G. I. WHITMER, President.

Attest:

W. H. COLLINGS,
Secretary.

NEW AMSTERDAM CASUALTY COMPANY (Seal)
Surety

By BOYD WILSON, Vice-President.

Attest:

W. R. GOSWEILER,
Assistant Secretary.

Countersigned: CHAS. SYKES & SON,

By FELIX R. CHEATHAM,
Resident Agent of Surety for the
State of Tennessee.
Address 611 Third Nat'l Bk. Bldg.,
Nashville, Tenn.

Appendix B.

Michie's Tennessee Code of 1938.

§7955. *Bond for payment of material and labor used in public work; condition and penalty of bond; advertisement.*—No contract shall be let for any public work in this state, by any city, county or state authority, until the contractor shall have first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by said contractor, or any immediate or remote sub-contractor under him, in said contract, in lawful money of the United States. The bond to be so given shall be for one-half of the contract price on all contracts of two thousand dollars, or under; one-half of the first two thousand dollars, and thirty-five per cent. of all over that amount on all contracts between two thousand dollars and five thousand dollars; and one-half of the first two thousand dollars, thirty-five per cent. on the balance on the next three thousand dollars, and twenty-five per cent. on the balance on all contracts over five thousand dollars. Where advertisement is made, the condition of the bond shall be stated in the advertisement; provided, that this statute shall not apply to contracts under one hundred dollars. In the event the contractor who has executed the bond gives notice, in writing, by return-receipt registered mail, to any laborer or furnisher of material or to any such immediate or remote sub-contractor, that he will not be responsible therefor, then such person who thereafter furnishes such material or labor shall not secure advantage of the provisions of this section, for materials furnished or labor done after the receipt of such notice. (1899, ch. 182, sec. 1; 1923, ch. 121, sec. 1; 1925, ch. 121, sec. 1, modified.)

Michie's Tennessee Code of 1938.**§7956. *Written notice, to be given to whom, and when.*—**

Such furnisher of labor or material, or such laborer, to secure the advantage of the two foregoing sections, shall, after such labor or material is furnished, or such labor is done, and within ninety days after the completion of such public work, give written notice by return receipt registered mail, or by personal delivery, either to the contractor who executed the bond, or to the public official who had charge of the letting or awarding of the contract; such written notice to set forth the nature, and itemized account of the material furnished or labor done, and balance due therefor; and a description of the property improved; provided, that in the case of public work undertaken by a municipality, or any of its commissions, notice, or statement herein required, so mailed or delivered to the mayor thereof, shall be deemed sufficient; in the case of public work by any county of any of its commissions, notice or statement herein required, so mailed, or delivered to the chairman of the county court of such county, shall be deemed sufficient; in the case of public work by the state, or any of its commissions, notice and statement herein required, so mailed, or delivered to the governor, shall be deemed sufficient. (1899, ch. 182, sec. 4; 1923, ch. 121, secs. 2, 4; 1925, ch. 121, sec. 4, modified.)

§7957. *Misdemeanor to fail to require bond.*—If any public officer, whose duty it is to let or award contracts, shall let or award any contract without requiring bond for payment of labor and material, in compliance with the provisions of section 7955, such officer shall be guilty of a misdemeanor. (1899, ch. 182, sec. 3; 1925, ch. 121, sec. 3, modified.)

Michie's Tennessee Code of 1938.

§7958. *Action on bond, by whom.*—Any laborer or furnisher of labor or material to said contractor, or to any immediate or remote sub-contractor under him, may bring an action on said bond, and have recovery in his own name, upon giving security, or taking the oath prescribed for poor persons as provided by law; but in the event of such suit, the city, county or state, shall not be liable for any costs accruing thereunder. (1899, ch. 182, sec. 2; 1923, ch. 121, sec. 3; 1925, ch. 121, sec. 2, modified.)

§7959. *Joinder and limitation.*—Several persons entitled may join in one suit on such bond, or one may file a bill in equity in behalf of all such, who may, upon execution of a bond for costs, by petition assert their rights in the proceeding; provided, that action shall be brought or claims so filed within six months following the completion of such public work, or of the furnishing of such labor or materials.

Appendix C.

Opinion of Special Term, Supreme Court, New York County.

(New York Law Journal Feb. 27, 1942)

Motion by plaintiff to strike out answer and for summary judgment is granted and defendant's cross-motion to dismiss is denied. Plaintiff, a materialman, sues defendant under a bond given for the benefit of any persons furnishing material pursuant to a contract of construction. Melvin F. Burgess, Inc., entered into a contract with the City of Knoxville, Tenn., for the construction or improvement of the electric distribution system for that city, known as "Contract F.-Rural Extensions; R. E. A. (Rural Electrification Administration) Project Tenn. 0030 A1-B1 Knoxville Public; P. W. A. Docket No. Tenn. 3289-P." Plaintiff furnished materials and has not been paid. Defendant contends that the complaint should be dismissed in its entirety because the bond sued upon is a statutory bond under the law of Tennessee; that the action was not brought within the six-months' period prescribed by such statute of Tennessee and that plaintiff has not pleaded nor proved compliance with conditions precedent; defendant also asks summary judgment on the ground that certain materials were not used in the job. The bond follows the form prescribed by the United States Government in P. W. A. projects. The bond contains no reference to Tennessee statutes nor to the short statute of limitations therein provided. Although the contract is made with the City of Knoxville and under ordinary circumstances would be subject to the laws of Tennessee, this contract is for a federal project and the bond given thereunder is to be liberally construed in favor of those for whose benefit it was given. It is a common law bond not given pursuant to any Tennessee statute and so construed, the first three defenses must be stricken out. The fourth defense is stricken out for the reason that if the Tennessee statutes do not apply then it is not necessary to allege and prove that the materials were "used" by the contract. The materials were furnished and the bond provides that it is for materials furnished for or on account of the construction to be performed.

Appendix D.**Opinion of the Supreme Court for the Eastern Division,
State of Tennessee.**

(175 S. W. (2d) 548.)

CITY OF KNOXVILLE*v.*MELVIN F. BURGESS, INC., *et al.*

GREEN, Chief Justice.

City of Knoxville, through a subsidiary, entered into a contract with Melvin F. Burgess, Inc., to construct an extension to the City's electric distribution system at a cost of \$200,000. The work was completed and accepted and there remains in the hands of the City a balance of some \$19,000 retained percentage.

It appears from a bill filed by the City that a number of persons furnishing material for this work have not been paid by the contractor. It further appears that the contractor executed a bond with New Amsterdam Casualty Company as surety to secure performance and to indemnify the City against default and also to protect laborers and materialmen. And later the contractor undertook to assign its claim for the retained percentage to this surety.

Under these circumstances the City filed a bill, in the nature of a bill of interpleader, making the contractor, the surety and the several unpaid creditor defendants. One of the creditors, Aluminum Company of America, answered

the City's bill and filed a cross bill against the Burgess Company and the surety seeking a recovery against the two for the amount of its unpaid claim, some \$9,000. The Surety Company demurred to this cross bill, its demurrer was sustained, and the cross bill dismissed outright. From this decree of the chancellor the surety has prosecuted an appeal to this Court.

The chancellor regarded as decisive of the merit of the cross bill the question as to whether the bond executed by the surety was a statutory bond or a common law bond. He was of opinion that in so far as the laborers and materialmen were involved the bond was a statutory bond under the laws of Tennessee and that suit thereupon was barred by Code § 7959. On the hearing before this Court the principal debate has been with respect to the nature of the bond.

Code § 7955 provides that "No contract shall be let for any public work in this state, by any city, county or state authority, until the contractor shall have first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by said contractor, or any immediate or remote sub-contractor under him, in said contract, in lawful money of the United States * * *."

Section 7958 provides that any laborer or furnisher of labor or material to said contractor, or to any immediate or remote sub-contractor under him, may bring an action on said bond and have recovery in his own name, etc., etc.

Code § 7959 is in these words:

"Several persons entitled may join in one suit on such bond, or one may file a bill in equity in behalf of all such, who may, upon execution of a bond for costs, by petition assert their rights in the proceeding; *provided*, that action shall be brought or claims so filed within six months following the completion of such public work, or of the furnishing of such labor or materials."

The Aluminum Company concedes herein that its cross bill was filed more than six months following the completion of this public work or of the furnishing of materials by it. Hence the chancellor's decision.

In view of the allegations in its cross bill it is difficult to see how the Aluminum Company can maintain that the bond it here sues on, in so far as it affects laborers and materialmen, is a common law bond.

Code §7956 provides that the furnisher of labor or material, to secure the advantage of the statute, shall "within ninety days after the completion of such public work, give written notice by return-receipt registered mail, or by personal delivery, either to the contractor who executed the bond, or to the public official who had charge of the letting or awarding of the contract." The cross bill avers that cross-complainant believed this work to have been accepted by the City on November 22, 1940, and that "cross-complainant gave notice to the New Amsterdam Casualty Company as required by statute in Section 7956 of the Code of Tennessee for 1932, by sending a registered letter to the surety under date of November 19, 1940, notifying the surety of the amount of the claim and substituting (submitting) an itemized statement to support such claim."

It was set out in the cross bill that cross-complainant had been previously informed that the affairs of the original contractor were in the hands of the surety and that the surety was completing all unfinished contracts. The cross bill continues, "It is alleged that this notice was within ninety days from the completion of the contract, or of the furnishing of materials by this cross-complainant, and that notice to the surety under the above circumstances was notice to the contractor as required under Section 7956, and within the time, and in the form and manner required in said statute."

The cross bill then sets out certain negotiations that transpired between cross-complainant and the surety and charges that certain action of the surety "was a deliberate attempt to forestall your cross-complainant from filing suit and that such action amounted to a waiver of Section 7959 of the Code of Tennessee requiring suit to be instituted within six months following the completion of such public work or the furnishing of such labor or materials."

In another paragraph of the cross bill a certain statement of an officer of the surety is mentioned and it is averred that such a statement "constitutes a waiver of Section 7959 of the Code of Tennessee regarding the filing of suit within six months from the completion of the work or the furnishing of the material."

In still another paragraph of the bill a different act of the surety is charged "as a waiver of its right to the fund in the hands of the City of Knoxville and a waiver of Section 7959 of the statutes of Tennessee."

Thus obviously the theory of the cross bill was that in so far as materialmen were concerned the bond sued on was a statutory bond and the rights of materialmen with respect to the bond were controlled by the Tennessee statute. Upon such pleading as the foregoing the cross-complainant is scarcely entitled to recovery against the surety on the theory that the bond in suit is a common law obligation as to materialmen. Nevertheless we consider this contention.

It was virtually conceded in argument that the bond in question was dual in its nature. That is, in one aspect it protected the City, in another aspect it protected laborers and materialmen. Bonds of this nature have been before this Court previously and the obligations to the governmental agency on the one hand and to laborers and materialmen on the other have been treated as distinct and separate obligations although combined in one paper. *City of Bristol v. Bostwick*, 139 Tenn., 304; *Cass v. Smith*, 146 Tenn., 218. The obligation to the governmental agency may be subject to the common law and the obligation to laborers and materialmen may be subject to the statute if the latter obligation is only such an obligation as is required by the statute. *Cass v. Smith, supra*.

An examination of the bond before us in so far as laborers and materialmen are concerned readily demonstrates that the surety undertook no other or further obligation than is required by our statute. In the bond the surety undertook to make good any failure of the principal in failing to "promptly make payment to all persons supplying

labor and materials for use in the construction of the Project contemplated in the Construction Contract and any amendments thereto."

It is also provided in the bond that it was made for the benefit of all persons furnishing materials or performing labor on account of the construction to be performed under the contract or any amendments and that such persons were made obligees with the right to sue just as if their names were written in the instrument.

The liability to laborers and materialmen thus assumed by the surety is no whit greater than that imposed by the statute. The statutory bond as construed in *Cass v. Smith, supra*, was held to cover material furnished for use in the contract and it was held that an immaterial divergence from the language of the statute did not alter the nature of the bond so long as the obligation remained the same as that imposed by the statute.

Cross-complainant relies on a line of authorities which hold that when a bond is conditioned more broadly than the statute requires, a recovery on it may be had as upon a valid common law obligation. That is, when the provisions go beyond the statutory requirements they may be given effect as common law obligations. See *State, ex rel. v. American Surety Co.*, 24 Tenn. App., and cases therein cited. It is insisted that the provisions of the bond before us as to laborers and materialmen do go beyond statutory requirements in several particulars.

It is submitted by counsel that the Tennessee statute requires a bond for laborers and materialmen in a sum proportioned but not equal to the amount of the contract, according to the formula set out in Code §7955, whereas this bond is for the full amount of the contract. As we pointed out in *City of Bristol v. Bostwick, supra*, however, a bond like this is not alone for the protection of laborers and materialmen but for the indemnity of the city in case of the contractor's default. Being for the two-fold purpose, naturally the bond in amount exceeds the statutory amount that would have been required on account of laborers and materialmen.

Amici curiae, who filed briefs herein, point out that under Code § 7955, "In the event the contractor who has executed the bond gives notice, in writing, by return-receipt registered mail, to any laborer or furnisher of material or to any such immediate or remote sub-contractor, that he will not be responsible therefor, then, such person who thereafter furnishes such material or labor shall not secure advantage of the provisions of this section, for materials furnished or labor done after the receipt of such notice," and it is said the bond contains no such provision and is not therefore a statutory bond. Why should the bond contain such provision? As we have above noted, the statute does not prescribe the language to be used in the bond and this statutory right is given to the surety whether the bond contains any such provision or not. Such provision would be entirely useless.

It is said that the bond in suit contains provision for amendments of the construction contract and for the continued liability of the surety after the amendments and after extensions of time of performance by the owner, etc., etc. We held in *Cass v. Smith, supra*, that the obligation of the surety to laborers and materialmen were not affected by alterations or amendments of the contract agreed upon between the contractor and the owner. In that case the Court said of laborers and materialmen:

"They were not parties to the alleged change in the the contract, and it is very well settled that the surety on a bond like this will not be relieved of the obligations to laborers and materialmen who did not participate in such an alteration agreement between the owner and the contractor."

In the foregoing the Court followed *Equitable Surety Co. v. United States*, 234 U. S. 448, and such is the general rule. Upon a consideration of many cases cited, the editor of a Note in 77 A. L. R., 195, expressed himself thus:

"The dual nature of public contractors' statutory bonds conditioned both for the faithful performance

of the contract and for the payment of laborers and materialmen has been explained at another place. See subd. IX, a, *supra*. As there shown, the rights of laborers and materialmen are independent of the rights of the obligee in the bond, and are the same as though the two undertakings were embraced in separate instruments. In accordance with these principles, it is held that the right of laborers and materialmen to recover against the surety on such a bond cannot be defeated by any act or omission of the obligee named in the instrument, not authorized or participated in by the laborers or materialmen, although the conduct or default is such as would release the surety from liability to the obligee."

It is further urged that because this bond contains no provision for notice of claim after completion of the work or furnishing of labor or material and because it contains no period of limitation for suit, it cannot be regarded as a statutory bond. The statute does not prescribe any form in which the bond for the protection of laborers and materialmen is to follow. If this bond had contained a provision for notice and a provision limiting the time for suit, such provisions would only be effective in so far as they coincided with the statutory requirements as to notice and time of suit. It has been held in a number of cases where the statute was silent as to the terms of the bond, that in case of a conflict between provisions of the bond and provisions of the statute as to the time limits prescribed by the statute, the statutory limits would prevail. *Smith & W. Co. v. Carlsted*, 165 Minn. 313; *Lawson v. Board of Pub. Instruction*, 118 Fla. 246; *U. S. Fidelity & G. Co. v. Tafel Electric Co.*, 262 Ky. 792. The Kentucky case grew out of a Tennessee contract. The Court held that it was governed by the Tennessee statute and that although the bond provided a longer time in which suit might be brought than did the statute nevertheless the short limitation of the Tennessee statute controlled and barred the suit.

The provision in the bond before us that laborers and materialmen were to be considered as obligees of the bond with the right to sue thereon added no greater obligation than the statute imposed and did not change the character of the bond as to laborers and materialmen.

For the reasons stated we think the chancellor correctly held that in so far as laborers and materialmen were concerned the bond herein sued on was a statutory bond.

It is argued, however, that Code §7959 heretofore set out is in the nature of an amendment to previous legislation. That prior to the enactment of §7959 our statute contained no provision for the several persons entitled thereunder to join in one suit on the bond and that the concluding portion of the section "provided, that action shall be brought or claims so filed within six months, etc., etc.," relates only to suits in which several individuals join and not to suits by separate individuals.

For this proposition we are referred to the general rule that a proviso is generally to be construed in connection with the section of which it forms a part and confined to that section. *Frix v. State*, 148 Tenn. 478; Lewis' *Sutherland on Statutory Construction*, Vol. 2, p. 352. This rule, however, is not applicable where a contrary intent is plainly to be inferred. There will be no sense in limiting the time in which a joint suit might be brought by several laborers or materialmen to six months and allowing such parties six years in which to bring suit if they file separate actions. Such discrimination would be hard to sustain.

Section 7959 originated in the Code of 1932. It is not to be regarded as an amendment to an earlier Act but as a part of the Act of 1931 which promulgated the Code of 1932. Obviously the purposes of the section were to prevent a multiplicity of suits and to fix a short period of limitation in which suits of this nature might be brought. Statutes for the protection of laborers and materialmen on public works are in force in most of the States and these statutes quite generally contain provisions similar in both aspects to the provisions of §7959. Such provisions are contained in the federal statute providing for bonds to

secure laborers and materialmen on government works. USCA., §270 (b).

Our attention is called to a decision of the New York Supreme Court, affirmed without opinion by the Appellate Division, wherein a suit was brought on the bond before us in New York by one of the materialmen against the surety. It was held in that case that the bond was a common law bond. It does not appear from the opinion of the trial judge that the contract entered into between the City and the contractor with respect to which this bond was written was before the New York Court. That contract particularly sets out that all provisions of the bond should be complete and in full accordance with statutory requirements. That the bond should be furnished by a surety company authorized to do business in the State of Tennessee and should be executed by an agent resident in that State.

Regardless of the New York decision, however, and with due respect, under previous decisions of this Court, the bond before us, in so far as laborers and materialmen are concerned, must be treated as a statutory bond.

As heretofore stated, the chancellor dismissed the cross bill. We are not satisfied to dispose of the cross bill on demurrer. Although not distinctly or fully brought out, construing it favorably, we think the cross bill discloses possible equities by way of waiver or estoppel in favor of Aluminum Company which call for an answer by the surety and development of all the facts. The case will be remanded to this end.

We have been favored with able briefs of amici curiae representing other materialmen. In so far as these arguments go to the merits of the case before us, we have considered them fully. We think the technical points raised by amici curiae are not such as are available to persons appearing in such character.

Reversed and remanded. Costs of appeal divided.

Appendix E.**Opinion of the Court of Appeals of the State of New York.**

(292 N. Y. 246.)

GRAYBAR ELECTRIC COMPANY, INC., Respondent, *v.* NEW
AMSTERDAM CASUALTY COMPANY, Appellant.

Decided March 10, 1944.

APPEAL from a judgment entered June 7, 1943, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department, which affirmed an order of Special Term (COHALAN, J.), granting a motion by plaintiff for summary judgment.

G. Arthur Blanchet and *Arthur W. Clement* for Appellant.

William L. Hanaway and *George W. Morgan, Jr.*, for respondent.

LOUGHRAN, J. Plaintiff supplied to a contractor materials for the performance of public work at Knoxville, Tennessee, and upon default in payment therefor began this action on a performance bond whereby the defendant surety company undertook with the local public authorities to make good the claims of laborers and materialmen. The answer of the surety company sets forth provisions of a Tennessee statute which authorizes a bond of that type. The substance of the several defenses is that the plaintiff failed to comply with conditions laid down by this statute as necessary to the recovery demanded in the complaint.

On motion by the plaintiff, Special Term held the defenses to be invalid and awarded to the plaintiff a summary judgment for the price of the materials in question—\$39,889.23. A cross motion by the defendant for summary dismissal of the complaint was denied. The Appellate Division affirmed and granted leave to the defendant to present the case to this court for review.

The ground of the decision at Special Term was that the bond in suit is a common-law bond. After that decision had been affirmed at the Appellate Division, the highest court of Tennessee in the case of *City of Knoxville v. Burgess* (— Tenn. —; 175 S. W. (2d) 548) pronounced this same bond to be a statutory bond insofar as the rights of laborers and materialmen are concerned. The bond was made and delivered in Tennessee and was there to be performed. Hence the character of the obligation of the instrument is to be determined in accordance with the relevant law of that State whether declared as common law or by statute. (*Teel v. Yost*, 128 N. Y. 387, 394.) We have been licensed to take judicial notice of foreign law (Civ. Prac. Act, §344-a). Accordingly, we now acknowledge the authority of *City of Knoxville v. Burgess* (*supra*) and we recognize the statutory nature of the bond in suit. (Whether section 344-a is to be applied in cases triable as of right by jury we need not now consider.)

The statute of Tennessee on which the surety company relies for its defenses makes these provisions: "Such furnisher of labor or material, or such laborer, to secure the advantage of the two foregoing sections [permitting them to sue on the statutory bond] shall, after such labor or material is furnished, or such labor is done, and within ninety days after the completion of such public work, give written notice by return-receipt registered mail, or by personal delivery, either to the contractor who executed the bond, or to the public official who had charge of the letting or awarding of the contract; such written notice to set forth the nature, and itemized account of the material furnished or labor done, and balance due therefor; and a description of the property improved; provided, that in the case of public work undertaken by a municipality, or any of its commissions, notice, or statement herein required, so mailed or delivered to the mayor thereof, shall be deemed sufficient * * *". (Tennessee Code, §7956.) "Several persons entitled may join in one suit on such bond, or one may file a bill in equity in behalf of all such, who may, upon execution of a bond for costs, by petition

assert their rights in the proceeding; provided, that action shall be brought or claims so filed within six months following the completion of such public work, or of the furnishing of such labor or materials." (Tennessee Code, §7959.)

Inasmuch as the bond in suit was given pursuant to this statute, the statutory text is to be read into the instrument. The notice so prescribed was never served by this plaintiff-materialman nor was this action commenced within the six months period so defined. In that state of the controversy, the decision now to be passed will determine this question: Do the provisions of the Tennessee statute pertain to the substance of the obligation of the bond in suit, with the result that the plaintiff has no case; or do these provisions go merely to the remedy for a breach of that obligation, with the result that they are immaterial, since the law that governs the remedy is the law of New York. (See *Reilly v. Steinhart*, 217 N. Y. 549.)

In *City of Knoxville v. Burgess* (*supra*), the highest Court of Tennessee said: "The statute does not prescribe any form in which the bond for the protection of laborers and materialmen is to follow. If this bond had contained a provision for notice and a provision limiting the time for suit, such provisions would only be effective in so far as they coincided with the statutory requirements as to notice and time of suit. It has been held in a number of cases where the statute was silent as to the terms of the bond, that in case of a conflict between provisions of the bond and provisions of the statutes as to the time limits prescribed by the statute, the statutory limits would prevail. *Smith & W. Co. v. Carlsted*, 165 Minn. 313; *Lawson v. Board of Pub. Instruction*, 118 Fla. 246; *U. S. Fidelity & G. Co. v. Tafel Electric Co.*, 262 Ky. 792. The Kentucky case grew out of a Tennessee contract. The Court held that it was governed by the Tennessee statute and that although the bond provided a longer time in which suit might be brought than did the statute, nevertheless the short limitation of the Tennessee statute controlled and barred the suit."

To our minds, these words mean that the provisions of the statute of Tennessee were limitations of the liability undertaken upon the bond in suit and not limitations of the rights of action thereby conferred upon laborers and materialmen. (Cf. *National Surety Co. v. Architectural Co.*, 226 U. S. 276; *Home Ins. Co. v. Dick*, 281 U. S. 397, 407; *Clark Plastering Co. v. Seaboard Surety Co.*, 259 N. Y. 424.) The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the "public acts" of a sister State. (*John Hancock Ins. Co. v. Yates*, 299 U. S. 178.)

It follows that the judgment should be reversed and the motion of the defendant for dismissal of the complaint granted, with costs in all courts.

LEHMAN, Ch. J., LEWIS, CONWAY, DESMOND and THACHER, JJ., concur; RIPPEY, J., dissents and votes to affirm.

Judgments reversed, etc.

Appendix F.

Opinion of the Supreme Court for the Middle Division of the
State of Tennessee.

BEN M. HOGAN,

v.

WALSH & WELLS, INCORPORATED, *et al.*

Shelby Equity.

Decided February 5, 1944.

177 S. W. (2d) 835.

PREWITT, Justice.

The only question presented for our determination on the petition for certiorari filed by the Standard Accident Insurance Company, which has been granted and argument heard, is whether the Insurance Company, surety on the bond of Walsh & Wells, Incorporated, to the City of Memphis, is liable to the complainant Hogan for labor and materials furnished for a public works contract, although Hogan did not give notice of his claim within the time required by the statutes.

The chancellor held that the cause was controlled by the cases of *City of Bristol v. Bostwick*, 139 Tenn., 304, and *Cass v. Smith*, 146 Tenn., 218, where it was held that the bonds sued on were dual in their nature, executed (1) for the purpose of indemnifying the cities against losses arising from any defaults of the contractors in the completion of the work in accordance with the terms of the contracts, and (2) to secure the payment in full of claims for labor and materials used in the construction of the projects. In the two cases cited above it was held that the bonds had two aspects, but that the performance condition of the bonds on account of their language did not change the feature of the instruments as to the claims for labor and materials.

In the instant cause, however, it is insisted by complainant Hogan that the language in the bond was materially different from that appearing in the bonds in the cases above cited.

We think the present cause is distinguishable from the cases referred to and also the recent case of *City of Knoxville v. Melvin F. Burgess*, 180 Tenn.,, 175 S. W. (2d), 548, in that the work was done under the provisions of the Federal Emergency Administration Public Works Act which authorizes the making of federal loans and grants to municipalities for the construction of public work projects to relieve the nation-wide unemployment, and the contract for the construction of this project required of the contractor not only what was required of him by the State Public Works Act but also what was required under the Federal Public Works Act. In accordance with the policy of said Act, the contract required (1) that the bond should be for the full amount to be paid for the construction of the project of over \$400,000, or nearly four times the amount of a bond required of contractors under the State Public Works Act; and (2) that the bond should secure the City for the payment of all bills, including the hiring of teams, equipment or machinery, and the operators thereof used on the work, and for oil and gasoline consumed, and for all labor performed on the work.

The condition of the bond itself is as follows:

“* * * the said contractor shall assume all undertakings under said agreement or contract and shall assure and protect all laborers and furnishers of material on said work both as provided by Chapter 182 of the Acts of the General Assembly of Tennessee of 1899, and any and all amendments thereto, including, without being limited to, Chapter 121 of the Public Acts of 1923, and Chapter 121 of the Public Acts of 1925, all of which were codified and re-enacted in Sections 7955-7959 inclusive, of the Code of Tennessee of 1932, and also independently of said statutes.”

“Now, THEREFORE, if the said contractor shall fully and faithfully perform all undertakings and obligations under the said agreement or contract hereinbefore referred to and shall fully indemnify and save harmless the said owner from all costs and damage whatsoever which it may suffer by reason of any failure on the part of said contractor so to do, and shall fully reimburse and repay the said owner any and all outlay and expense which it may incur in making good any such default and shall fully pay for all the labor, material and work used by said contractor or any immediate or remote contractor or furnisher of material under him in the performance of said contract, in lawful money of the United States as the same shall become due, then this obligation or bond shall be null and void, otherwise to remain in full force and effect.”

As to that part of the bond relating to the claims of laborers and furnishers of material, the condition of the bond is that the contractor “shall assure and protect all laborers and furnishers of material on said work * * *, and also independently of said statutes.”

In the three cases cited above the bonds were held to be statutory bonds because the conditions in the bonds were limited to the language of the statutes, and the furnishers of labor and materials had no right of action against the obligors except by virtue of the statutes. [Here the language of the bond is broader and more comprehensive and exceeds the provisions of the statutes and refers to the statutes, “and also independently of said statutes.” The Court of Appeals held that the words “and also independently of said statutes” must be given some meaning and were no doubt added for the protection of those persons who might furnish labor and materials on said contract but who for some reason might not be entitled to recover by virtue of the statutes, and that this provision was inserted in the bond in accordance with the policy of the Federal Emergency Administration to furnish employment to a large class of people who were unemployed in a time of widespread depression and naturally to see

that they were paid their just claims, notwithstanding their failure to meet the requirements of the statutes.]

The parties were capable of entering into such an undertaking. The City had authority to demand a bond broader in its scope than that required by the State statutes, and the surety in the regular course of its business, and no doubt for a sufficient consideration, assumed all the obligations and conditions incorporated in the bond.

Where a statute requires that the contractor for a public improvement shall "give a bond conditioned for the payment of labor and materials, the bond may be conditioned more broadly than the statute requires, and if a bond so conditioned is voluntarily given in consideration of the contract, its extra-statutory provisions may be enforced as a valid common-law obligation." 43 Am. Jur., Public Works and Contracts, §146; *Clatsop County ex rel. Hildebrand v. Feldschau*, 101 Ore., 361, 199 Pac., 953, 18 A. L. R., 1221.

In the *Feldschau* case, in addition to the statutory condition "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials," etc., the bond was also conditioned to pay "all just debts, dues, and demands incurred in the performance of such work." In holding that the surety was liable under this latter provision, the Court said in 18 A. L. R. at page 1224:

"* * * The surety company in the ordinary course of business, and it may be fairly assumed for compensation, voluntarily obligated itself as sponsor for Feldschau in the faithful performance of the contract, and the performance of all of the conditions incorporated in the bond. The parties were competent to enter into the undertaking. The bond was not repugnant to the letter or policy of the law, but was strictly in accordance with the policy of the law in this state to provide for the payment of labor and supplies and expenses in the construction of public works. Although the statute did not require all of the conditions to be enumerated in the

bond, the county authorities were under a moral duty to protect persons with whom the contractor incurred such indebtedness in the performance of the work. The award of the contract for the improvement was a sufficient consideration for the promise of the contractor and his surety to pay such indebtedness. It is generally held that those furnishing supplies or extending credit, for whose benefit such a bond is given, may sue upon the bond, on the principles that the third person for whose benefit a contract is made by another may maintain an action thereon, although the consideration does not directly move from such third person."

See also *Puget Sound State Bank v. Galluci*, 82 Wash., 445, 144 Pac., 698, Ann. Cas. 1916A, 767.

We therefore hold that the condition "and also independently of said statutes" will inure to the benefit of laborers and materialmen so as to make the bond a common-law obligation rather than strictly a statutory one as to labor and materials.

It results that the decree of the Court of Appeals will be affirmed.